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Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages

Nicholas M. Miller

'TIS BETTER TO GIVE THAN TO RECEIVE: CHARITABLE DONATIONS OF MEDICAL MALPRACTICE PUNITIVE DAMAGES

> "Virtue down the middle," said the Devil as he sat between two lawyers.[1]
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> It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by [punitive] damages, they should go to the compensated sufferer ....[2]
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> Charity is the most noble of virtues .... [I]f one has charity in this life, he has it completely and perfectly.[3]

I. INTRODUCTION

As the story goes, in 1986, a Philadelphia jury awarded $1 million to a "spiritual advisor" who claimed, in a medical malpractice case, to have lost her

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[1] H.L. MENKEN, A NEW DICTIONARY OF QUOTATIONS 668 (1966).

[2] Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877).

[3] SAINT THOMAS AQUINAS, ON CHARITY 81-82 (Lottie H. Kendzierski trans., 1960).

psychic powers as a result of a negligently administered CAT scan.[4] In another case, a jury awarded $98.5 million in punitive damages to the mother of an infant born a spastic quadriplegic because nurses did not quickly enough diagnose complications in the delivery.[5] In yet another case, a jury awarded a man $124,573,750 in punitive damages in addition to $3,047,819 in compensatory damages for the loss of his eye caused by a negligently administered injection.[6]

We have all heard the stories. Medical malpractice awards are like a recurring dream with a bad theme: the system is out of whack.

More specifically, the common perception is that punitive damages in medical malpractice claims contribute greatly to health care costs that have soared to crisis levels.[7] Regardless of whether these beliefs are well-founded,[8] concerns over punitive damages in medical malpractice claims have emerged to the forefront of political debate and the national agenda in the past decade.[9] For example, while discussing rising health care costs, President Clinton noted that "more people talk to me about their health care problems . . . than anything else."[10] This support for tort reform formed the foundation of House Republicans' Contract with America and the Common Sense Legal Standards Reform Act vetoed by President Clinton.[11] A near-consensus has formed among average citizens that our tort system needs serious reform.[12]

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[4]The actual case was Haims v. Hart, #1981-4408, in the Philadelphia Court of Common Pleas, noted in NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY 11 (1995). This case was reported in several publications. *See, e.g.*, PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 5 (1991); Sharon Begley, *The Meaning of Junk*, NEWSWEEK, Mar. 22, 1993, at 62; *Liability Reform Is Coming*, Editorial, WASH. POST, Apr. 1, 1986, at A18; Frederick N. Tulsky, *Did Jury's Award Consider Psychic's Loss of Powers?* NAT'L L.J., Apr. 14, 1986, at 9.

[5]*Malpractice Plaintiffs Hit Big*, HOSP. AND HEALTH NETWORKS, Mar. 5, 1996, at 14.

[6]Procter v. Davis, 656 N.E.2d 23, 25 (Ill. App. 1994).

[7]*See* Symposium, *Constitutional Limitations on Tort Reform. Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299 (1987).

[8]Some commentators argue that the common perception is not well founded and that current attitudes towards punitive damages are based on inaccurate or unrepresentative anecdotal evidence. *See* VIDMAR, *supra* note 4, at 11.

[9]According to some commentators, "[t]he mid-1980's marked the emergence of the liability crisis" that has continued to this day. W. Kip Viscusi & Patricia Born *The National Implications of Liability Reforms for General Liability and Medical Malpractice Insurance*, 24 SETON HALL L. REV. 1743, 1743 (1994).

[10]*Transcript of 2nd TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES, Oct. 16, 1992, at A11 [hereinafter *Transcript of 2nd Television Debate*].

[11]H.R. 956, 104th Cong., 1st Sess. (1995).

[12]Note, *'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1765 (1996).

What is not so clear is who to blame for these seemingly out-of-control awards. All groups involved have received some criticism: doctors,[13] greedy plaintiffs,[14] the health care industry,[15] judges,[16] juries,[17] and lawyers.[18] Some critics blame everyone equally.[19] In a single column, one newspaper journalist blamed plaintiffs who receive "windfall" awards; "overly sympathetic juries" who grant "excessive awards;" "sharp lawyers" with "political clout" who think "the sky is the limit;" the "incomprehensible logic of bureaucrats;" the "vagaries

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[13] *See, e.g.*, ROBERT M. YOUNGSON & IAN SCHOTT, MEDICAL BLUNDERS (1996); MARTIN FIDO & KAREN FIDO, THE WORLD'S WORST MEDICAL MISTAKES: AMAZING TRUE STORIES ON MAD, BAD AND DANGEROUS DOCTORS (1996); Thomas Lundmark, *Surgery by an Unauthorized Surgeon as Battery*, 10 J.L. & HEALTH 287 (1995-96); *13,012 Questionable Doctors*, HEALTH LETTER, Apr. 1996, at 1.

[14] Philip K. Howard, *Judges and Courts Should Perform Justice, Not Theater*, STAR TRIBUNE, Apr. 16, 1995, at 11A. "Anyone with the good fortune to have a misfortune can get rich . . . . Even humdrum accidents result in feigned outrage and demands of $10 million or more." *Id.*

[15] Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975 (1995).

> The 'Big Four'—hospitals, doctors, insurance companies, and drug manufacturers—actively lobby to restrict punitive damages in medical malpractice litigation. This 'medical-industrial complex' has great political influence. Six-hundred and fifty groups spent more than $100 million from January 1993 to last March [1994] to influence the outcome of health care legislation.

Id. at 980-81.

[16] Keith N. Hylton, *Rule 68, The Modified British Rule, and Civil Litigation Reform*, 1 MICH. L. & POL'Y REV. 73 (1996). "Our legislators could make considerably more progress, at the state level, in discouraging frivolous litigation by raising the minimum qualifications of judicial candidates." *Id.* at 74.

[17] Bernadine Healy, Editorial, *Legal Reform Won't Hurt Women*, PLAIN DEALER, May 5, 1995, at 11B.

> Juries are asked to impose these damages on a purely subjective, emotional basis. They are in excess of the amounts needed to pay for the harm actually done. One juror [explained] her reasons for awarding $10 million against a Washington D.C. doctor and hospital: "I think it had something to do with sounding like a round figure."

Id.; *see also* Peter Shuck, *Mapping the Debate on Jury Reform*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306 (Robert E. Litan ed., 1993). *But see* VIDMAR, *supra* note 4 at 11 (arguing that juries have been used as "scapegoats" for the perceived problem).

[18] *See* Helen Lippman, *Why You Want Tort Reform*, BUS. & HEALTH, Dec. 1995, at 34. A recent survey indicated that ninety-six percent of respondents believe that medical malpractice tort reform should include a limit on attorney fees. *Id. See also*, SKID MARKS: COMMON JOKES ABOUT COMMON LAWYERS (Michael Rafferty ed., 1988). "Everyone in my family follows the medical profession," noted Smith. "They're lawyers." *Id.* at 52.

[19] *See, e.g., In Uneven Lawsuit System, Justice Gets Low Priority*, USA TODAY, Dec. 18, 1996, at 12A [hereinafter *Uneven Lawsuit System*].

of judges;" "powerful businesses" who get "special treatment;" lobbyists who peddle influence; and the entire tort system that resembles a "lottery" for all involved.[20]

A continuum of responses has formed which addresses this perceived problem. A small minority of voices claim that the current status of the medical malpractice tort system functions adequately to address parties' needs.[21] According to one commentator, "the major malpractice problem continues to be malpractice."[22] Indeed, some recent studies provide evidence that, contrary to common perception, jury awards in medical malpractice cases are not excessive.[23] Furthermore, judges often quietly reverse or reduce well-publicized, seemingly excessive jury verdicts.[24] Other commentators have conceded that jury awards in medical malpractice cases somewhat favor plaintiffs but argue that the problem is not nearly as extreme as it has been portrayed.[25] Some scholars have recognized that supporters and critics of medical malpractice tort reform each have persuasive data supporting their respective positions.[26]

From the large majority of voices that call for change, reform proposals vary greatly. Some claim that nearly any change would improve the current system because soaring costs have stifled and deterred medical technology advances.[27] Others advance reform because litigation costs become burden-

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[20] *Id.*

[21] Matthew Kauffman, *Legal Reforms May Have Limited Effect in State*, HARTFORD COURANT, Apr. 10, 1995, at A1. Anthony Nuzzo, president of the Connecticut Defense Lawyers Association says, "Number 1: There aren't any excessive awards, and 2: There aren't many frivolous cases filed in the courts." *Id.*; *see also*, Julie Brienza, *Punitive Damages Are Rare Independent Study Shows*, TRIAL, Aug. 1996, at 14-15.

[22] Randall R. Bovbjerg et al., *Defensive Medicine and Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL'Y & L. 267 (1996).

[23] *See* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993).

[24] *See* Nathan Prater, Comment, *Punitive Damages in Alabama: A Proposal for Reform*, 26 CUMB. L. REV. 1005, 1014 (1995-1996).

[25] *See, e.g.*, David Klingman et al., *Measuring Defensive Medicine Using Clinical Scenario Surveys*, 21 J. HEALTH POL. & L. 104 (1996). In this article, the authors analyze the effect of large jury awards on physician practices. For a more thorough discussion of defensive medicine and its accompanying costs to the health care system, *see infra* notes 92-96 and accompanying text.

[26] *See* Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 485-90 (1993); *see also* Michele M. Jochner, *Punitive Damages: The U.S. Supreme Court's Meandering Path*, 83 ILL. B.J. 576, 577 (1995).

[27] Viscusi & Born, *supra* note 9 at 1744. Professor Viscusi and Ms. Born note that vaccine production and contraceptive research "grounded to a halt" at the height of the liability "crisis" in the mid 1980s. *Id.*

some even in successful defenses against medical malpractice.[28] Others advocate extreme measures. For example, in a slightly different context, one popular writer, Peter Huber, advocates "lawyerectomy."[29]

More reasoned voices call for judicial or legislative action. Some believe that a major source of seemingly excessive awards is a weak-kneed judiciary[30] and encourage active use of the remittitur power of judges.[31] Supporters of legislative reform have for years advocated the British Rule of attorney fee-shifting as a deterrent to filing frivolous lawsuits and as an incentive to settlement before trial.[32] One interesting proposal that specifically addresses rising health care costs and the accompanying burden on the poor is to extend Good Samaritan acts to provide immunity to doctors treating indigents.[33]

Two recent trends have emerged in medical malpractice legislative reform in an effort to address these seemingly excessive awards. First, many states have placed absolute caps on punitive damage recoveries.[34] Second, a growing

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[28] James F. McCarty, *$6.25 Million Malpractice Award in Death Overturned As Excessive*, PLAIN DEALER, Jan. 8, 1993, at 1B. The Cleveland-area physician, Dr. Harry Figgie III, complained, "People wonder why health-care costs are spiraling. It's from this kind of claptrap that people drag us [physicians] through." *Id.*

[29] Peter Huber, *Rx: Radical Lawyerectomy*, FORBES, Jan. 27, 1997, at 112. Huber asks, "How do you trim $20 billion a year from Medicare?" His answer: "The easiest way: amputate lawyers." *Id.* This author suspects that Mr. Huber would apply the same logic to medical malpractice punitive damages tort reform.

[30] Hylton, *supra* note 16, at 74. Professor Hylton argues, "[i]f frivolous litigation is a serious problem, it has more to do with the quality of decision-making in the judiciary than with the incentives [to bring frivolous suits] provided by the existing procedural rules." *Id.*

[31] David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995). Remittitur is "the procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 897 (6th ed. 1991). A judge may condition a denied motion for a new trial on a plaintiff's remittitur in a stated amount. FED. R. CIV. P. 59 (a).

[32] *See generally* Hylton, *supra* note 16. Professor Hylton examines the comparative incentives Federal Civil Rule 68 and a proposed "Modified British Rule" would produce.

[33] Bridget A. Burke, *Using Good Samaritan Acts To Provide Access to Health Care for the Poor: A Modest Proposal*, 1 ANNALS HEALTH L. 139 (1992). Good Samaritan statutes create immunity from civil liability for those who volunteer medical assistance to others in an emergency situation. *Id.* at 140.

[34] The following twenty-two states have enacted statutory caps on awards: ALASKA STAT. § 09.17.010 (Michie 1992) ($500,000 limit for noneconomic damages in personal injury actions, not including disfigurement or severe physical impairment); CAL. CIV. CODE § 3333.2 (West 1993) ($250,000 limit for noneconomic damages in medical malpractice cases); COLO. REV. STAT. § 13-21-102.5 (1992) ($250,000 limit for noneconomic damages generally, $500,000 limit for noneconomic damages when there is clear and convincing evidence which justifies such a finding by the court); IDAHO CODE § 6-1603 (1992) ($400,000 limit for noneconomic damages in personal injury action); 735 ILL. COMP. STAT. 5/2-1115 (Smith-Hurd 1992) (no punitive damages allowed in medical malpractice cases); IND. CODE ANN. § 16-9.5-2-2 (Burns 1992) ($750,000 limit on all

number of states have enacted split-award statutes,[35] which place limits on the percentage of punitive damages the plaintiff can recover, with the remaining percentage passing to the state.

The purpose of this Note is not to answer the question of how excessive medical malpractice and punitive damage awards are. Many highly respected scholars on different sides of the issue have spent large portions of their careers trying to resolve that issue without finding a common ground. This author does not boldly claim to provide an answer in this limited forum.

This Note does, however, address a possible source of public frustration with the state of medical malpractice and punitive damages: the lack of a principled basis for the awards that juries give to the victims. The perception among many average citizens is that all the parties involved—plaintiffs, lawyers, doctors,

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damages recoverable for injuries in a medical malpractice action); KAN. STAT. ANN. § 60-340 (1986) ($250,000 limit on noneconomic damages in medical malpractice cases); LA. REV. STAT. ANN. § 40:1299.42.B(1) (West 1992) ($500,000 limit on all damages except medical expenses); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1992) ($350,000 limit on noneconomic damages in any action for personal injury); MASS GEN. LAWS ANN. ch. 231, § 60H (West 1992) ($500,000 limit for noneconomic damages in medical malpractice actions, not including wrongful death actions); MICH. COMP. LAWS § 600.1583 (1986) ($225,000 limit for noneconomic damages in medical malpractice cases); MO. ANN. STAT. § 538.210 (West 1992) ($350,000 limit for noneconomic damages in medical malpractice cases); NEB. REV. STAT. § 44-2825 (1992) ($1,250,000 limit on all damages in medical malpractice cases); N.H. REV. STAT. ANN. § 508:4-d (1986) ($875,000 limit on noneconomic damages for personal injury cases); N.M. STAT. ANN. § 41-5-6 (Michie 1992) ($500,000 limit on punitive damages in medical malpractice action); OR. REV. STAT. § 18.560(1) (1992) ($500,00 limit on damages arising from bodily injury); S.D. CODIFIED LAWS ANN. § 21-3-11 (Michie 1992) ($1,000,000 limit for all damages in medical malpractice cases); UTAH CODE ANN. § 78-14-7.1 (1987) ($250,000 limit on noneconomic damages in medical malpractice cases); VA. CODE ANN. § 8.01-581.15 (Michie 1992) ($1,000,000 limit for all damages in medical malpractice cases); W.VA. CODE § 55-7B-8 (1992) ($1,000,000 for noneconomic loss in medical malpractice cases); WIS. STAT. ANN. § 893.55(4)(d) (West 1992) ($1,000,000 limit for noneconomic damages in medical malpractice cases); WYO. STAT. ANN. § 1-4-101 (Michie 1992) (damages for personal injury limited to that recoverable under the wrongful death act).

In addition to those states above, the following three states previously had caps: HAW. REV. STAT. §§ 663-8.5, -8.7 (1991) ($375,000 limit for pain and suffering, distinguished from other noneconomic damages of mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and other pecuniary losses or claims) (legislation repealed effective Oct. 1, 1993); MINN. STAT. § 549.23 (1993) ($400,000 limit on embarrassment, emotional distress, and loss of consortium) (legislation repealed effective May, 4, 1990); WASH. REV. CODE ANN. § 4.56.250 (West 1992) ($1,000,000 variable cap on noneconomic damages for personal injury cases).

[35]To date, nine states have enacted a "split award" statute. *See* COLO. REV. STAT. § 13-21-102 (West 1986); FLA. STAT. ANN. § 768.73(2)- (4) (West 1986); GA. CODE ANN. § 51-12-5.1(e)(1)-(2) (1987); 110 ILL. REV. STAT. 2.1207 (1986); IOWA CODE ANN. § 668A.1(1)-(2) (West 1987); KAN. STAT. ANN. § 60-3402(e) (1988); MO. REV. STAT. § 537.675 (1987); OR. REV. STAT. § 18.540 (1987); UTAH CODE ANN. § 78-18-1(3) (1989). Additionally, three states are attempting to join the trend by enacting legislation to create a split award statute. Texas, Indiana, and New Jersey all have bills pending.

hospitals—try to get their proverbial piece of the pie.[36] This Note demonstrates that this perception of the medical malpractice tort system has some validity because current treatment of punitive damages does not serve the goals of the civil system. This Note also offers charitable donations of punitive damage awards as an alternative to the current approaches. Unlike traditional approaches to medical malpractice punitive damages, charitable donations of punitive damages would not suffer from the same problems of excessive compensation to the plaintiff, insufficient deterrent of the defendant, or the constitutional problems associated with government claims on punitive damages in split statute jurisdictions.

Part II of this Note discusses the common sense goals of compensation, deterrence, and punishment that all areas of our legal system strive to accomplish.[37] Part III of this Note shows how the current status of punitive damages fails to meet these goals.[38] Specifically, Part III demonstrates that allowing victims of medical malpractice to keep punitive damage awards overcompensates plaintiffs, that placing caps on punitives underdeters wrongful conduct, and that split statutes — while an improvement — suffer from both of these problems to a lesser degree. Part IV offers charitable donations as an alternative to these common approaches and shows how this approach provides for appropriate punishment and deterrence of wrongful acts, a principled amount of compensation to the victim, and the greatest benefit for the greatest number of people.[39]

As a final introductory note, the author offers this proposal for use in all areas of punitive damages. Medical malpractice punitive damages have been chosen as the focus of this Note because they have caused particular alarm in the past several years.[40] This choice of focus in no way limits the number of other contexts in which these principles may apply.

II. COMMON SENSE GOALS OF THE LAW

A common phenomenon in any area of problem-solving is to lose sight of the larger objective when wading through the details. This trap is especially pervasive when dealing with the law. Keeping this in mind, one must realize that the goals of the law are both noble and straightforward: First, wrongs must be compensated. Second, egregious wrongs must be punished and deterred. These goals permeate all areas of the law.

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[36] *See Uneven Lawsuit System, supra* note 19. This scathing article seems to be fairly representative of the common complaints of the medical malpractice tort system.

[37] *See infra* notes 41-76 and accompanying text.

[38] *See infra* notes 77-156 and accompanying text.

[39] *See infra* notes 157-202 and accompanying text.

[40] Rustad & Koenig, *supra* note 15, at 978. "Few topics in health care policy generate more passion than punitive damage awards in medical malpractice cases." *Id.*

A. Compensation of Wrongs

Although one need not devote extensive discussion to prove such seemingly self-evident propositions, two examples will illustrate the concept of compensation of wrongful acts. First, in contract law, a promisee of a breached contract is ordinarily entitled to her "expectation interest," her "reliance interest," or her "restitution interest."[41] The purpose of these remedies is to put her in the same position she would have been had no breach occurred, had no contract been made, or had she not conferred on the promissor any benefit.[42] Generally, when liquidated damages have been identified by the contract terms, the promisee may not recover an amount that would exceed reasonable compensation or that would function as punishment of the promissor.[43] In ordinary cases, punishment is not the goal of the law.

Second, in tort law, "the concern [is] with compensation for harm done."[44] The goal of tort law is "primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."[45] The goal of tort law mirrors the goal of contract law: compensation of wrongs.[46] One respected authority has discussed the role of damages:

> The primary aim in measuring damages is compensation, and this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred, and that the damages for breach of contract should place the plaintiff in the position he would be in if the contract had been fulfilled.[47]

Quite simply, the law strives to correct wrongful acts.

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[41] RESTATEMENT (SECOND) OF CONTRACTS, § 344 (1978).

[42] *Id.* This rationale is standard language for many contract cases. *See* Ed Miller & Sons Inc. v. Earl, 502 N.W.2d. 444, 450 (Neb. 1993) ("In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he or she would have occupied had the contract been performed, that is, to make the injured party whole.").

[43] RESTATEMENT (SECOND) OF CONTRACTS § 356 (1) (1978).

> Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

Id.

[44] PAGE KEETON & ROBERT E. KEETON, TORTS: CASES AND MATERIALS 2 (2d ed. 1977).

[45] RESTATEMENT (SECOND) TORTS § 901 cmt. a. (1979).

[46] *See* Trotsky v. Civil Serv. Comm'n, Pittsburgh, 652 A.2d 813, 817 (Pa. 1995).

[47] CHARLES T. MCCORMICK, MCCORMICK ON DAMAGES § 137 (1935).

B. Punishment and Deterrence of Egregious Wrongs

Another purpose of the law is to punish and deter especially wrongful acts, or "conduct which unjustifiably or inexcusably causes or threatens substantial harm to individual or public interests."[48] While this function of the law is most obviously seen in the area of criminal law, the goals of punishment and deterrence also form the basis of punitive damages in tort actions,[49] and to a lesser degree, other areas of the law.[50]

The criminal law provided the original justifications of retribution and deterrence that have since spread to other areas of the law. Philosophers such as Mill and Bentham saw the social utility and deterrent effect of punishment: citizens would observe the punishment and would be deterred from committing the wrongful act in the future.[51]

> Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act . . . . The mischief which would have ensued from the act, if performed, will . . . have been prevented.[52]

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[48] N.Y. REV. PENAL LAW § 1.05 (McKinney 1996). *See also* MPC § 1.02 (West 1997).

> (1) The general purposes of the provisions governing the definition of offenses are: (a) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes.

Id.

[49] KEETON & KEETON, *supra* note 44, at 1.

[50] *See, e.g.*, Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of Cal., 686 P.2d 1158 (Cal. 1984) *overruled by* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740 (Cal. 1995). In Seaman's, the California Supreme Court held that a party in breach of contract may incur additional tort damages by denying in bad faith the existence of a contract. 686 P.2d at 1168. Although Della Penna overruled Seaman's, a defendant may nonetheless incur additional liability for a wrongful breach if the plaintiff proves that the defendant committed some independent wrongful act in addition to the breach of contract. These cases illustrate that, even in a seemingly straightforward contract case that would not normall involve punishment or deterrence, these elements of tort and criminal law can surface.

[51] For an excellent overview of the utilitarian justification of punishment see JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 74-86 (1984). *See also* Jeremy Bentham, *Principles of Penal Law, in* J. BENTHAM'S WORKS 367, 402 (John Bowring ed. 1843).

[52] Bentham, *supra* note 51, at 396.

Other philosophers, such as Kant and Hegel, advocated the view that society had a *duty* to punish wrongdoers.[53] Modern scholars have likewise stressed the goal and utility of punishment.[54]

Much like the criminal law, punitive damages in tort law have a long history of punishment and deterrence of egregious wrongs.[55] As early as 2000 B.C. and the Code of Hammurabi, punitive damages have existed.[56] Several forms of multiple damage awards under Mosaic Law have Biblical references.[57] For example, the Old Testament states, "if a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."[58] Roman Law and English Common Law both utilized punitive damages when the tort-feasor displayed malice when inflicting injury on the victim.[59] The 1784 case of *Genay v. Norris*[60] is the first reported American case awarding punitive damages.[61]

The role of punitive damages in the civil system has endured to this day. Congress has embraced punitive damages and has incorporated them into various statutes.[62] Virtually every state legislature has passed statutes

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[53] IMMANUEL KANT, THE PHILOSOPHY OF LAW 131 (W. Hastie trans., 1887).

> But what is the mode and measure of punishment which public justice takes as its principle and standard? It is the just principle of equality . . . It may be rendered by saying that the undeserved evil which any one commits on another is to be regarded as perpetrated on himself . . . This is the right of retaliation (*jus talionis*) . . . .

Id.; *see also* John Mackie, *Retribution: A Test Case for Ethical Objectivity, in* PHILOSOPHY OF LAW 677 (Joel Feinberg & Hyman Gross eds., 1991). "Annulment: This notion . . . goes back at least to Hegel . . . . Hegel's idea seems to be that as long as a criminal goes scot-free, the crime itself still exists, still flourishes, but when the criminal is adequately punished, the crime itself is somehow wiped out." *Id.*

[54] *See* MICHAEL MOORE, LAW AND PSYCHIATRY 238-243 (1984) (advocating the retributivist view of giving "just deserts" for wrongs committed). For a discussion of the justifications of punishment, see generally MURPHY & COLEMAN, *supra* note 51, at 113-131.

[55] For an in-depth view of the role of punishment in the civil system see Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1 (1989). For an extended view of the history of punitive damages see 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3-17 (2d ed. 1989).

[56] SCHLUETER & REDDEN, *supra* note 55, at 3-4.

[57] *Id.* at 4.

[58] Exodus 22:1.

[59] SCHLUETER & REDDEN, *supra* note 55, at 5-7.

[60] 1 S.C.L. 6, 1 Bay 6 (1784).

[61] *See* Jochner, *supra* note 26, at 577.

[62] *See, e.g.*, 18 U.S.C. 1964(c):

> Any person injured in his business or property by reason of violation of section 1962 [RICO: Racketeer Influenced and Corrupt Organizations] of this chapter may sue therefor [sic] in any appropriate United States district court and shall recover threefold the

providing for punitive damages when the wrongdoer has exhibited conduct surpassing mere negligence, including medical malpractice claims.[63] The Restatement (Second) of Torts defines the punitive damage award and describes its purpose:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
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> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.[64]

The widespread support that punitive damages have had throughout history reflects the moral force of its concept: especially harmful conduct must be punished and prevented in the future.[65] Although occasionally commentators have criticized the idea of allowing the plaintiff to keep the punitive damages,[66] overall support for the concept has not wavered.[67]

Only in relatively recent history have punitive damages been questioned.[68] Several factors have led to the recent criticism, not the least of which are the seemingly outrageous medical malpractice awards plaintiffs have collected. One might argue that the recent criticism of punitive damages has not

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> damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

Id. This section provides for so-called "private citizen attorneys general." For further discussion, *see infra* notes 103-05 and accompanying text.

[63] *See, e.g.*, OHIO REV. CODE ANN. § 2315.21(B) (Banks-Baldwin 1996). A plaintiff may recover punitive damages from a defendant if

> (1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate; [and] (2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions [described above].

Id.

[64] RESTATEMENT (SECOND) OF TORTS § 908 (1979).

[65] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 375-80 (1994).

[66] As early as 1852, the Supreme Court recognized the criticisms of punitive damage payments to plaintiffs. Day v. Woodworth, 54 U.S. 363 (13 How. 1852). "We are aware that the propriety of this doctrine has been questioned by some writers . . . ." *Id.* at 371.

[67] *See* SCHLUETER & REDDEN *supra* note 55, at 24-25.

[68] *See* Vidmar, *supra* note 23, at 218.

originated from their failure to punish and deter egregious wrongs,[69] but rather from the overextension of another goal of the law: compensation of victims.[70]

In theory, the law stands upon common sense,[71] and it garners support when it accomplishes its goals of compensation, punishment, and deterrence.[72] However, when the civil court system appears in many cases to reflect a "litigation lottery,"[73] the law no longer reflects the moral condemnation[74] or "common conscience"[75] of the people. Current approaches to solving the perceived punitive damages problem simply sacrifice one goal in favor of another. Any real solution to excessive malpractice awards must incorporate all of the common sense goals of the law.

III. CURRENT POLICY REGARDING PUNITIVE DAMAGES DOES NOT SERVE COMMON SENSE GOALS

At common law, the plaintiff recovered punitive damages for which the defendant was liable.[76] In response to the perceived excessiveness of recent medical malpractice awards, some legislatures have passed statutory caps;[77] others have passed split-award statutes that allocate punitive awards between the plaintiff and the state.[78] These approaches do not adequately accomplish the common sense goals of compensation, punishment, and deterrence.

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[69] *But see* Peter A. Glassman et al., *Physicians' Personal Malpractice Experiences Are Not Related to Defensive Clinical Practices*, 21 J. HEALTH POL. POL'Y & L. 219 (1996).

[70] *Id.*

[71] *See* McCann, M.D. v. Lee, 679 So. 2d 658 (Ala. 1996). Judges have a duty to use common sense when analyzing the law. *Id.*

[72] The law represents "the nature and limits of power which can legitimately be exercised by society over the individual." J.S. MILL, ON LIBERTY 70 (David Spitz ed., 1975). When the law fails to accomplish the goals of compensation, retribution and deterrence, it exceeds the limits of its power. *Id.*

[73] Rachel Kreier, *Playing the Liability Lottery*, AM. MED. NEWS, Apr. 15, 1996, at 7-8.

[74] SANFORD H. KADISH & STEPHEN J. SCHULLHOFER, CRIMINAL LAW AND ITS PROCESSES 104-05 (6th ed. 1995). "Punishment is the way in which society expresses its denunciation of wrong doing, and, in order to maintain respect for law, it is essential that the punishment . . . should adequately reflect the revulsion felt by the great majority of citizens for them." *Id.* (citing ROYAL COMMISSION ON CAPITAL PUNISHMENT 207 (Denning ed., 1949)).

[75] *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108-09 (Simpson trans., 1964). According to Durkheim, punishment must reflect the "common conscience," the moral conscience," or the "collective sentiment" of the community. *Id.*

[76] Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 3 (1989).

[77] *See* statutes cited *supra* note 34.

[78] *See* statues cited *supra* note 35.

A. Plaintiff's Recovery of Punitive Damages

The common law approach toward punitive damages receives the most criticism, perhaps because newer treatments of punitive damages have yet to manifest their deficiencies. Critics of the common law approach often cite resulting problems of overcompensation of the plaintiff, attacks on the credibility of the civil justice system, overdeterrence of health care providers, and the lack of a rational justification for allowing the plaintiff to keep the entire punitive award. The following text addresses each criticism.

Allowing a plaintiff to recover punitive damages overcompensates the loss attributable to his injuries. For example, in *Schaefer v. Miller*[79] an ophthalmologist removed the plaintiff's cataract without obtaining informed consent and failed to properly treat her eye after it had developed an infection.[80] The jury awarded $350,000 in compensatory damages to the plaintiff and $750,000 in punitive damages.[81] The jury based the large punitive award on evidence indicating that Dr. Miller forged several other patients' consent forms in addition to the plaintiff's.[82] The prior forgeries in no way diminished or enlarged plaintiff's injuries in this case, but the jury awarded her $1.1 million in large part on other patients' misfortune.[83] Had the plaintiff suffered the same injury without the "benefit" of having the doctor commit egregious wrongs against others, the plaintiff undoubtedly would have received less or no punitive damages. Precisely this type of capitalization on the medical misfortunes of others leads to the perception that punitive damages overcompensate plaintiffs.[84]

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[79]587 A.2d 491 (Md. Ct. App. 1991).

[80]*Id.* at 494-95.

[81]*Id.* at 495.

[82]*Id.* at 494-95.

[83]A recent non-medical case illustrates this problem. *See* BMW v. Gore, 116 S. Ct. 1589 (1996). This is the so-called "$2 million paint job case." Lippman, *supra* note 18, at 34. In Gore, the jury awarded plaintiff $4,000 for the damage to his own car and $4,000,000 in punitive damages for the damage done to 1000 *other* purchasers' cars. Gore, 116 S. Ct. at 1593. Not only did the jury award plaintiff a windfall, but awarded it at the expense of other purchasers' misfortune. The Alabama Supreme Court adjusted the punitive award to $2 million, and the United States Supreme Court reversed and remanded. *Id. See infra* notes 137-156 and accompanying text for a discussion of excessive fines challenges.

[84]Supporters of this type of punitive damage award would undoubtedly argue that each plaintiff has a right to sue for punitive damages based on the doctor's conduct, not other patients' injuries. Courts may grant multiple awards for punitive damages.

This ignores the reality that juries will not award large punitive damages without accompanying injury to third parties despite whatever degree of egregious conduct in which the physician engages. Indeed, the award of punitive damages may be at the expense of the other victims. First, because punitive damages often depend upon the suffering of third persons, punitive damages are at the expense of others. Second, because a defendant may not be able to pay punitive damages to more than one plaintiff,

Allowing the plaintiff to keep punitive damages also creates the perception of excessive awards and undermines the credibility of the justice system that allows such awards.[85] Common perception is that the plaintiff simply gets an "excessive"[86] amount, or a "windfall."[87] Courts have occasionally echoed this same thought. For example, Chief Justice Rehnquist, one of the more vocal critics of plaintiff recovery of punitive damages, argued:

> Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but not more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not the plaintiff—who by hypothesis is fully compensated.[88]

More often, courts have not echoed this thought. For example, in *TXO Production Corp. v. Alliance Resources Corp.*,[89] the Supreme Court held that a $10 million punitive damage award to a plaintiff who had incurred $19,000 in actual damages was not excessive.[90]

Allowing plaintiffs to keep punitive damage awards also causes overdeterrence.[91] Critics of the common law approach argue that doctors practice defensive medicine in response to perceived excessive punitive damage awards.[92] Duke University researchers described defensive medicine

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the punitive damage award may be at the expense of third parties.

[85] *See Uneven Lawsuit System*, *supra* note 19; *see also* SKID MARKS, *supra* note 18, at 26:

> A lawyer had a jury trial in a very difficult business case. The client who had attended the trial was out of town at the time the jury came back with its decision. The decision was a complete victory for the lawyer and his client. The lawyer excitedly sent a telegram to the client, which read, simply:
>
> "Justice has triumphed!"
>
> The client, a realistic man, received the telegram and wired back:
>
> "Appeal at once!"

[86] One concerned reader, seeking the "Advice of Counsel," the name of the column, asked: "I read about the size of some punitive damage awards and shake my head because they seem so excessive. When can punitive awards be assessed in cases of nursing malpractice, and do malpractice insurers cover these damages?" Donna Lee Mantel, R.N., *Advice of Counsel*, RN, Sept. 16, 1996, at 67.

[87] Sloane, *supra* note 26, at 475.

[88] Smith v. Wade, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting).

[89] 509 U.S. 443 (1993).

[90] *Id.*

[91] *See* James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 N.W.U.L. REV. 1130, 1130 (1992).

[92] *See* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353 (1996). In answering their own question in the affirmative, Kessler and McClellan conclude that initial medical malpractice tort reforms reduced defensive medicine costs by five percent to nine percent without adversely affecting medical care.

as occurring "when physicians order tests procedures or visits, or avoid high-risk patients or procedures, primarily (but not necessarily solely) to reduce their exposure to malpractice liability."[93]

Like ordinary citizens, doctors hear the sensationalized stories of outrageous punitive damage awards and, quite naturally, attempt to avoid any appearance of malpractice. Two methods of avoiding liability exist: prescribing every treatment that has any possibility of marginal benefit,[94] or avoiding any treatment that poses any significant risk.[95] The Duke University researchers noted this same distinction: "When physicians perform tests or procedures primarily to reduce exposure to liability, they are practicing *positive* defensive medicine. When they avoid certain patients or procedures, they are practicing *negative* defensive medicine."[96] Both forms of defensive medicine are extremely expensive to the consumer, either in terms of much higher insurance premiums[97] or in terms of reduced access to higher-risk health care treatment.[98]

In addition to these tremendous costs, allowing plaintiffs to keep punitive damages lacks a principled justification. The dwindling number of supporters of the common law approach offer several theories of justification. All fail.

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[93] *See* Klingman et. al., *supra* note 25, at 188-89. In this clinical scenario survey, the authors measured the costs to consumers in terms of added expense for unnecessary routine procedures and in terms of poorer health caused by unperformed procedures due to the risk involved.

[94] *See, e.g.*, Peter D. Jacobson & C. John Rosenquist, *The Use of Low-Osmolar Contrast Agents: Technological Change and Defensive Medicine*, 21 J. HEALTH POL. & L. 243 (1996). Jacobson and Rosenquist conclude that, although physicians are primarily concerned for the patient's health, the use of technologically-newer and substantially more expensive low osmolar contrast agents results in part from liability concerns. *Id.* Doctors widely use the new technology despite the statistically insignificant health advantage at costs upwards of twenty times the older method. *Id.* at 244-45.

[95] "The most frequently cited examples of negative defensive medicine are decisions by family practitioners and even some obstetrician-gynecologists to stop providing obstetric services." Klingman et. al., *supra* note 25, at 189 n.2. *See* Healy, *supra* note 17, at 11B. "Some products used exclusively for women—namely those for pregnancy and contraception—are particularly susceptible to withdrawal by companies fearing lawsuits." Some commentators argue that proposed medical malpractice punitive damage reform has potential for bias against women. *See, e.g.*, Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1; Lisa Ruda, Note, *Caps on Non-Economic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197 (1993).

[96] *See* Viscusi & Born, *supra* note 9; Jacobson & Rosenquist, *supra* note 94; *see also* Geoffry Cowley, *Beyond the Mammogram*, NEWSWEEK, Feb. 27, 1997, at 59. Cowley discusses new digital testing technologies that cost roughly three times as much as conventional mammograms. No evidence shows that the new method detects more tumors than the old, but proponents believe eventually the new technique will justify the cost.

[97] *See* Viscusi & Born, *supra* note 9.

[98] *See* Klingman et al., *supra* note 25.

First, supporters of the traditional approach often claim that the plaintiff should keep punitive damages because she has suffered an egregious wrong that affects her health.[99] A victim of an extra-harsh wrong will often deserve a greater award, but this is true only when she has suffered greater injury.[100] If the victim has suffered greater injury due to the malice of the health care provider, the law should to make the plaintiff whole through direct *compensatory* damages.[101] To say that the victim has suffered greater injury is not an answer to why she should recover punitive damages.[102]

Second, supporters of the traditional approach often claim that the plaintiff should receive punitive damages as compensation for his services as a private attorney general.[103] Without any compensation, plaintiffs would not pursue punitive damages and society would not benefit from the better health care that results from punishment of harmful doctors.[104] Public policy favors compensation of plaintiffs as an incentive to bring punitive damage suits against egregious wrongdoers, but limitless recovery of punitive damages provides more incentive than is necessary to ensure that society benefits from punishment of harmful medical treatment. Allowing plaintiffs to keep entire punitive damage awards overcompensates and creates too large an incentive to seek punitive damages.[105]

Third, supporters of the traditional approach often claim that punitive damages should be awarded to the plaintiff as payment for attorney's fees,[106] and some courts still subscribe to this rationale. For example, in *Markey v. Santangelo*,[107] the Connecticut Supreme Court stated that "punitive damages consist of a reasonable expense properly incurred in the litigation."[108]

However, much like the justification of compensation for providing a public service,[109] this rationale goes too far in providing an incentive for the plaintiff to bring suit. While it is true that public policy justifies rewarding plaintiffs for bringing suit against egregious wrongdoers,[110] awarding the plaintiffs the entire punitive damage amount is unnecessary and counterproductive. If

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[99] *See* Prater, *supra* note 24, at 1034-35.

[100] *See* MCCORMICK, *supra* note 47.

[101] Breslo, *supra* note 91, at 1137-39.

[102] Owen, *supra* note 65, at 384-96.

[103] Prater, *supra* note 24, at 1033-34.

[104] Sloane, *supra* note 26, at 480-81.

[105] Breslo, *supra* note 91, at 1133.

[106] Prater, *supra* note 24, at 1035. *See also* Breslo, *supra* note 91, at 1136-37.

[107] 485 A.2d 1305 (Conn. 1985).

[108] *Id.* at 1308 (citations omitted).

[109] *See* Prater, *supra* note 24.

[110] *See supra* notes 104-105 and accompanying text.

payment of attorney fees were the true reason for awarding the plaintiff entire punitive damage awards, then no rational basis would exist for allowing the plaintiff's recovery to exceed his litigation costs and his compensatory damage award. To award the plaintiff litigation costs is not an answer to why he should keep entire punitive damage awards.

B. Statutory Caps[111]

Knee-jerk reaction to seemingly excessive malpractice awards knows no color or social class. This country's highest-ranking leaders exhibit the same frustrations as average citizens. For example, President Bush explained that

> one thing to blame is these malpractice lawsuits. They are breaking the system. It costs 20 to 25 billion dollars a year and I want to see those outrageous claims capped. Doctors don't dare deliver babies sometimes because they're afraid that somebody's going to sue them. People don't dare—medical practitioners—to help somebody along the highway that are hurt [sic], because they're afraid that some lawyer's going to come along and get a big lawsuit.[112]

Both major political parties have attempted to tackle the perceived problem of runaway health care costs. President Clinton promised "universal health care coverage,"[113] but failed to implement his plan early in his first term. Despite sweeping Congressional gains in 1994, Republican health care proposals have also stalled. States have passed statutory caps in the absence of federal legislation.[114]

The impetus behind the statutory caps was the perceived excessiveness of the punitive awards and their adverse ramifications. Unfortunately, caps on punitive damages have an immense unintended consequence: subversion of the goals of retribution and deterrence.[115]

Placing caps on punitive awards despite the egregiousness of conduct and wealth of the defendant is arbitrary. The result of any arbitrarily picked amount is that its full effect will not reach the defendants most able to bear these costs.[116] Current standards for awarding punitive damages incorporate "[t]he amount of punitive damages which will have a deterrent effect on the defendant in the

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111 *See* statutes cited *supra* note 34.

112 *Transcript of the 2nd Televised Debate*, *supra* note 10.

113 Adam Clymer, *The Health Care Debate: The Overview; National Health Program, President's Greatest Goal Declared Dead in Congress*, N.Y. TIMES, September 27, 1994, at A1.

114 *See* statutes cited *supra* note 34.

115 *See* Note, *'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1774 (1996). "To the extent that punitive damages currently correct for the tort system's inability to hold all tort-feasors accountable, a cap may result in underdeterrence." *Id.*

116 *See* Stephen G. Good, *Defending Against Punitives*, 21 No.2 Litigation 29, 64 (1995).

light of the defendant's financial situation."[117] Caps, however, prevent imposition of punitive damages on especially wealthy or especially egregious wrongdoers necessary to sufficiently punish or adequately deter wrongful conduct.[118] A commentator describing a famous case in a non-medical context provides a striking example of the problem:

> Of course, what is a 'huge' punitive award is relative to the wealth of the defendant. An attorney representing the plaintiffs in the Exxon Valdez case described the plaintiffs' punitive damage claim of $15 billion as a 'hiccup' for an oil company the size of Exxon. Perhaps in the future, this amount will be scoffed at (in private) by some mega-defendant as a mere pittance.[119]

Furthermore, as defendants become aware of the upper limit of their potential liability, arbitrarily capped punitive damage costs become fixed and predictable.[120] According to one commentator,

> [u]ncertainty as to the amount of the punitive damage award is desirable because it prevents defendants, particularly corporations, from engaging in cost-benefit analyses that affect their conduct.
>
> . . . .
>
> . . . In a "cap" state, a corporation has the ability to estimate how many potential lawsuits will be brought in connection with the defect, then can calculate with precision what the cost of not fixing the defect will be. Essentially this allows the corporation to reduce the concern for societal safety to an issue of economics.[121]

Statutory caps on punitive damages simply shift the incentive for abuse from the plaintiffs who seek a "litigation lottery"[122] to "amoral corporations"[123] who seek to gain a profit, even through egregious practices.

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[117]Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California, California Jury Instructions § 14.71 (West 1997).

[118]*See* Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345 (1995).

[119]Good, *supra* note 116, at 64.

[120]*See* Sloane, *supra* note 26, at 484 n.60.

[121]*Id.*

[122]*See* Kreier, *supra* note 73.

[123]*See* Rustad & Koenig, *supra* note 15.

C. *Split Awards*[124]

In response to the perceived problem of excessive punitive awards, some states have enacted split statutes that attempt to retain the deterrent effect while reducing, without eliminating, the plaintiff's incentive to pursue punitive damages.[125] Split statutes allow the plaintiff to pursue punitive damages, but retain only a portion of the award.[126] The states' general funds typically retain the balance of the award, but some states earmark the awards for the specific governmental agency best able to prevent the wrongful conduct.[127] For example, Kansas requires placement of state recovery of punitive damages in a health care stabilization fund.[128] The statutes vary with regard to the percentage that the state and plaintiff each receive. For example, in Georgia, plaintiffs must remit seventy-five percent of punitive damage awards to the state;[129] in Colorado, the plaintiff need only remit one-third of the punitive award to the state.[130]

Public policy favors payment to a plaintiff who brings a punitive damage suit against an egregious wrongdoer. A sound basis exists for allowing the plaintiff to keep more than compensatory damages. The traditional approach rewards this public service by allowing the plaintiff to keep the entire punitive damage award. Perceived as abused by plaintiffs, recent reform included caps on punitive damages and split statutes.

Proponents argue that split statutes provide compensation, retribution and deterrence, and avoid overcompensation and overdeterrence. They argue that split statutes fully punish and fully deter egregious conduct while they reduce the incentive to seek punitive damages by allowing the plaintiff to keep only a relatively small percentage of the award. Indeed, even the most generous split statute jurisdictions require the plaintiff to forfeit a third of his punitive award. Some jurisdictions require forfeiture of three-fourths of the plaintiff's punitive award.

Supporters offer an additional basis for support: by awarding the state with a large percentage of the punitive damage award, future victims of malpractice might benefit from this award, not just the lone plaintiff. For example, the state might apply the portion of the punitive damage award it keeps to support the Medical Licensing Board under the theory that more people in the future will benefit from a fully-funded, adequately-staffed Licensing Board that does a more thorough job of investigating doctor malpractice.

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[124] *See* statutes cited *supra* note 35.

[125] *See* Sloane *supra* note 26, at 478.

[126] *Id.*

[127] *Id.*

[128] KAN. STAT. ANN. § 60-3402 (e) (1988).

[129] GA. CODE ANN. § 51-12-5.1 (e)(1)-(2) (1987).

[130] COLO. REV. STAT. § 13-21-102 (4) (West 1996).

Although split awards are an improvement to the traditional approach to punitive damages, this approach is an inadequate solution. Split awards enlarge government and face constitutional complications.

First, retention by the state of any portion of punitive damage awards flies in the face of current bipartisan support for smaller government. Conservatives, who made great gains in 1994 in both the federal and state legislatures,[131] have held as a pillar of their ideology the concept of "devolution."[132] Lawmakers on both the state and federal level, who came into office on the wave of the Contract with America theme, seemed to hold dear the words of President Reagan who said that "[g]overnment *is* the problem."[133] Democratic leadership took hold of this same theme, as President Clinton made similar proclamations: "The era of big government is over,"[134] and "government must do more with less."[135]

In this context, the growing support for split statutes illustrates the perceived magnitude of the medical malpractice punitive damage awards. That nine state legislatures in this era of smaller government have appropriated for state use anywhere between one-half and two-thirds of the billions of dollars in punitive damages awarded each year is quite remarkable. Even more remarkable is the widespread public support this appropriation has received. For many, support for split statutes exist only by default, a lesser of two evils: enlargement of government over "millionaire-through-injury syndrome."[136]

Retention by the state of any portion of punitive damages poses constitutional problems.[137] In the past several years, the Supreme Court has heard a series of cases involving the constitutionality of certain punitive damage awards and statutes.[138] The issues involved double jeopardy, excessive fines, equal protection, self-incrimination, and due process.[139] Critics have argued that this line of decisions raises more questions than answers to many

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[131] David Broder, *A Historic Republican Triumph: GOP Captures Congress; Sharp Turn To Right Reflects Doubts About Clinton, Democrats*, WASH. POST, Nov. 9, 1994, at A1. Republicans gained a majority in the House and Senate for the first time in forty years. The Republicans also gained control of seven of the eight largest state capitals. *Id.*

[132] Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL'Y REV. 429, 430 (1996).

[133] Lou Cannon, *Inaugural Address: Evocative Version of Campaign Message; The Inaugural Address: Enunciating a Basic Creed*, WASH. POST, Jan. 21, 1981, at A29.

[134] Alison Mitchell, *State of the Union: The Overview: Clinton Offers Challenge to Nation, Declaring, 'Era of Big Government is Over,'* N.Y. TIMES, Jan 24, 1996, at A1.

[135] Perry Willis, *Clinton's "Smaller Govt.," Will Cost $800 Billion*, PRESIDENTIAL CAMPAIGN PRESS MATERIALS, Jan. 20, 1997.

[136] Howard, *supra* note 14.

[137] Sloane, *supra* note 26, at 494.

[138] Jochner, *supra* note 26, at 576.

[139] Breslo, *supra* note 91, at 1131-33.

of these issues.[140] Justice Scalia complained in *Pacific Mutual Life Insurance v. Haslip*[141] that the Court had "perpetuate[d] the uncertainty that our grant of certiorari in this case was intended to resolve."[142] At best, the Court has not settled many issues that involve punitive damages in the civil system.

One of the few issues that the Court apparently had settled, has re-emerged as a potential problem in light of recent split statutes giving the state an interest in civil awards. Since *Browning-Ferris Indusutries of Vermont v. Kelco Disposal, Inc.*,[143] defendants had ceased challenging punitive damages on excessive fines grounds.[144] *Browning-Ferris* had stood as a definitive statement that the Court would not interfere with a plaintiff's recovery of punitive damage awards on excessive fines grounds. However, three decisions after *Browning-Ferris* have put the status of split statutes in doubt.

In *Browning-Ferris*, the Court noted that the Excessive Fines Clause had been "appl[ied] primarily, and perhaps exclusively, to criminal prosecutions and punishments."[145] The Court reasoned that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages."[146] The Court held that the Eighth Amendment "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded.*"[147] Because the state traditionally did not have any claim on the punitive damage award, the defendant could not implicate the Excessive Fines Clause.

The Court reassessed the civil-criminal distinction four years later in *Austin v. United States*.[148] The United States initiated forfeiture proceedings against Mr. Austin's body shop and mobile home after his conviction for cocaine possession on those properties.[149] Austin claimed that the forfeiture proceedings violated the Excessive Fines Clause. The government argued that the forfeiture did not constitute a punishment because it protected the public from future drug trade and acted as compensation for expense incurred in

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[140]Jochner, *supra* note 26, at 576.

[141]499 U.S. 1 (1991).

[142]*Id.* at 24 (Scalia, J., dissenting).

[143]492 U.S. 257 (1989).

[144]U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

[145]Browning-Ferris, 492 U.S. at 262.

[146]*Id.* at 266.

[147]*Id.* at 263-64 (emphasis added).

[148]509 U.S. 602 (1993).

[149]The government initiated proceedings pursuant to 21 U.S.C. §§ 881 (a)(4) and (a)(7) (1988). *Id.*

enforcement of the drug laws.[150] The Court rejected the government's argument and held that a forfeiture to the government constitutes a punishment.[151] Significantly, the Court failed to strictly limit the holding to criminal forfeitures and left open the door that *Browning-Ferris* initially appeared to close.

In addition to *Austin*, the decisions in *Honda Motor Co. v. Oberg*[152] and *BMW of North America, Inc. v. Gore*[153] puts plaintiffs who seek punitive damages on notice that the Court's pendulum has swung in defendants' favor. Although the Court did not decide *Gore* and *Oberg* on excessive fines grounds, their holdings indicate a greatly increased amenability to the invalidation of punitive damages. The *Oberg* decision represented the first punitive damage award struck down by the Supreme Court. The defendant successfully argued that a unique state statute prohibiting judicial review of a five million dollar punitive damage award violated his Fourteenth Amendment due process rights. Initial reaction to the decision downplayed its significance and attributed the result as a reaction to the unconventional statute.[154]

The *Gore* decision, however, provides strong evidence that the *Oberg* decision was not an aberration. In *Gore*, the Supreme Court ruled that a two million dollar punitive damage award for BMW's failure to disclose minor damage and repairs prior to sale of new cars impermissibly exceeded the $4000 in actual damage caused to the plaintiff. The Court held that such "grossly excessive" awards violated the car manufacturer's due process rights. Again, while the decision did not rest on excessive fines grounds, *Gore* represents the Court's newfound antagonism towards punitive damage awards.

State recovery of a portion of the award in split-statute states will not help to remove this distaste for punitive damage awards. With the enactment of split statutes in nine states[155] and the Supreme Court decisions in *Austin*, *Oberg*, and *Gore*, the Excessive Fines Clause has re-emerged as a potential obstacle to treatment of punitive damages.

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[150] *Id.* The government pointed to a previous holding in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), as support for the proposition that the government may seize property connected with illegal or harmful activity in order to protect the public. *Id.* at 621. The Court, however, narrowly interpreted 89 Firearms. *Id.*

[151] *Id.* at 622.

[152] 512 U.S. 415 (1994).

[153] 116 S. Ct. 1589 (1996).

[154] Jochner, *supra* note 26, at 582-83.

[155] *See* statutes cited *supra* note 35.

IV. CHARITABLE DONATIONS: AN ALTERNATIVE THAT WOULD SERVE THE GOALS OF OUR CIVIL SYSTEM

This Note demonstrated in Part II that the common abuse goals of the civil system include compensation, punishment, and deterrence.[156] Part III of this Note noted that the current methods of dealing with the perceived problems of excessive punitive damages fail to reach these goals.[157] This part offers charitable donations as a method that would accomplish those goals.

Punitive damages pose a dilemma for reformers because a balance between competing interests is difficult to strike. The traditional approach tends to overcompensate the plaintiff and overdeter health care providers.[158] One possible solution, statutory caps, addresses the problem of overcompensation, but the unintended result is underdeterrence of egregious conduct.[159] Another possible solution, split statutes, somewhat addresses the problem of underdeterrence of egregious wrongdoing and approximates proper compensation, but enlarges government and faces constitutional problems.[160]

One alternative that lawmakers have not utilized provides a viable solution to the punitive damages riddle: charitable donations of punitive damages. This alternative offers the appropriate amount of incentive for the plaintiff to pursue punitive damages, provides the appropriate amount of punishment and deterrence of egregious conduct, avoids political reservations and constitutional concerns associated with state interests attaching to punitive awards, and produces benefits for the community that common approaches to punitive damages cannot possibly achieve.

A. The Proposal

The proposed charitable donation alternative consists of a relatively simple framework, consisting of four rules:

1. A jury shall assess punitive damages against defendants whom the plaintiff proves acted maliciously or egregiously.
2. The degree of egregiousness and the amount of penalty sufficient to punish and deter repeated wrongful acts shall function as the only limit to the amount of the assessment. The jury should consider the wealth of the health care provider at fault.
3. As an incentive to pursue punitive damages and as compensation for performing a public service, the plaintiff shall receive one-third of the punitive damage award.

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156 *See supra* notes 41-75 and accompanying text.

157 *See supra* notes 76-153 and accompanying text.

158 *See supra* notes 79-110 and accompanying text.

159 *See supra* notes 111-21 and accompanying text.

160 *See supra* notes 122-53 and accompanying text.

4. The plaintiff, with court approval, shall designate the recipient of the remainder of the award. The recipient must use the funds to assist current or future victims of similar egregious misconduct.

Each rule requires brief comment.

The first rule intends to adopt the current standard for imposing punitive damages. Keeping in line with the goals of the civil system, this approach aims to subject wrongdoers to liability that exceeds compensatory liability only when the health care provider has committed an egregious wrong.

The second rule completely repudiates any notion of arbitrarily limited punitive liability and is fully consistent with traditional common law. This rule envisions punitive damages commensurate with the wrongful health care provider's ability to pay. For example, the rule does not limit the punitive liability of a pharmaceutical company to $250,000 when proper punishment and deterrence require a ten million dollar award. Average citizens appear to have little sympathy for those health care providers who are driven purely for profit.[161] Recent attacks on the rich and corporate America,[162] specifically in the health care industry, suggest that this rule would enjoy wide support.

The third rule recognizes compensation for public services rendered as the true reason for allowing plaintiffs to recover an amount above compensatory damages. The state has an interest in creating an incentive to pursue punitive damage claims. The state also has an interest in realistically limiting that incentive.

The allocation of one-third of the punitive damage award for the plaintiff represents the standard retainer fee for attorneys. In essence, the plaintiff acts as a private attorney general when she pursues punitive damages against egregious wrongdoers. She provides a service to society by gaining a judgment and punishing and deterring future medical misconduct. Her compensation for this service increases as she punishes and deters more egregious and more harmful conduct. The rule places a limit on the percentage of punitive damages that the plaintiff can recover, but such a limit will not unduly deter pursuit of punitive damages. More importantly, the defendant does not enjoy an upper limit above which that health care provider will not be liable.

Finally, the fourth rule provides for the public benefit of the egregious wrongdoing. The rule gives the victim who has suffered egregious wrongdoing the opportunity to decide how current and future victims of the same type of wrongdoing might best benefit from the punitive damages. The rule limits the use of the funds and includes a check on abuse of this privilege by requiring judicial approval of proposed donations.

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[161] *See* Kenneth Labich, *How To Fire People and Still Sleep at Night*, FORTUNE, June 10, 1996, at 65; David C. Band & Charles M. Tustin, *Strategic Downsizing*, 33 MANAGEMENT DECISION 36 (1995). Articles such as these will not improve corporate America's reputation for greed.

[162] Shira McCarthy, *Downsizing Era Continues as AT&T Gives 40,000 the Boot*, TELEPHONY, Jan. 8, 1996, at 8.

B. The Benefits of Charitable Donations

Charitable donations of a significant portion of the punitve damages award present a variety of advantages: adequate compensation of the victim, sufficient punishment and deterrence of an egregious wrongdoer, prevention of windfall awards to plaintiffs, reduction of the currently over-inflated incentive to pursue punitive damages, political appeal, and avoidance of many constitutional concerns. Furthermore, the law favors charitable donations because of the benefit to society that they produce. Finally, this particular proposal provides the plaintiff compensation for the services she provides in pursuing punitive damages from egregious wrongdoers.

This charitable donation proposal would adequately compensate the victim. Unlike some approaches to non-pecuniary awards, this proposed charitable donation approach does not affect the amount of compensatory damages a plaintiff can recover, including amounts for pain and suffering. [163]

Proposals to limit the amount of pain and suffering damages recoverable circumvent the purpose of the tort system: compensation for injuries caused.[164] For example, in *Taylor v. Medenica, M.D.*,[165] a doctor who was the sole stockholder of a medical laboratory treated the plaintiff for breast cancer with a drug that no medical expert recognized as standard care. Indeed, the doctor himself had written an article on the treatment of breast cancer and had not mentioned the drug prescribed. The plaintiff's condition worsened, and the doctor ordered—through his own laboratory—"excessive," "bizarre," and "questionable" tests, which the court concluded were "conducted for the purpose of generating income." The woman subsequently died, and the jury awarded to her estate and her husband four million dollars in compensatory damages and ten million dollars in punitive damages. The jury acted reasonably. However, if the woman had lived in Michigan, for example, the state would have limited her estate and her husband to a recovery of $225,000 for non-economic losses, including pain and suffering.[166] This proposal would not limit the plaintiff to an arbitrarily determined amount of pain and suffering damages because that limit would frustrate the goal of adequate compensation.[167]

Unlike statutory cap jurisdictions,[168] the charitable donation alternative fully punishes and deters egregious wrongdoers. Large and wealthy health care organizations with the potential for inflicting the most harm are primary beneficiaries of upper limits on punitive damages. Moreover, they are best able

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[163] *See* statutes cited *supra* note 34.

[164] *See* RESTATEMENT (SECOND) TORTS § 901 (a) (1979).

[165] 479 S.E.2d 35 (S.C. 1996).

[166] MICH. COMP LAWS § 600.1583 (1986).

[167] *See* MCCORMICK, *supra* note 47.

[168] *See* statutes cited *supra* note 34.

to bear the cost of such damages. Statutory caps create the unfortunate situation of least-deterring those tort-feasors who require the most deterrence. Much like the split-statute jurisdictions,[169] this charitable donation proposal avoids that problem. This proposal does not restrict the assessment of an amount of damages necessary to adequately deter future wrongful conduct—whatever that amount might be.

Another advantage of this charitable donation proposal is that it would prevent "windfall" awards to plaintiffs and temper the inflated incentive to pursue punitive damages that currently exist. Unlike the tradition of allowing the plaintiff to recover the full amount of a punitive damage award, this proposal limits the plaintiff's recovery of punitive damages to an amount that compensates him for his service to the public. Much like split statutes, this proposal reduces—without eliminating—the incentive for plaintiffs to pursue punitive damages.

Unlike split statutes, however, charitable donations of punitive damages avoid many of the constitutional problems associated with government interests in civil damage awards and provide political appeal for those who call for smaller government. Under this plan, the government has no claim to any portion of the punitive damage award. The entire amount passes to the plaintiff, the plaintiff's attorney, and the private organization or trust approved by the court.

Charitable donations enjoy an advantage that no other approach to punitive damages can claim: charitable donations serve the public good.[170] "It is well recognized that charitable gifts are favored by the law and by the courts. Courts will give effect to charitable gifts where it is possible to do so consistent with recognized rules of law."[171] True, courts understand that punitive damages serve an important social purpose, but courts see the problems inherent in awarding large punitive awards to a single plaintiff or a state entity. Charitable donations present a different scenario. Instead of questioning the possible abuse by government in pursuing punitive damages in split-statute jurisdictions, or questioning the motive of plaintiffs in common law states, courts in these proposed charitable donation jurisdictions can more comfortably embrace awards of punitive damages. Courts do not need to be as skeptical of the motives of those plaintiffs who pursue punitive damages.

The law shows this high regard for charitable donations in the areas of tax law and the law of trusts. The Internal Revenue Code states that "[t]here shall be allowed as a deduction any charitable contribution . . . payment of which is

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[169] *See* statutes cited *supra* note 35.

[170] 14 C.J.S., Charities § 2 (a) (1979). "In its legal sense, a charity may be broadly defined as a gift for general public use; in its ordinary sense, the term 'charity' is employed as meaning benevolence, philanthropy, or goodwill or relief or alms to the poor." *Id.*

[171] Mercy Hosp. of Williston v. Stillwell, 358 N.W.2d 506, 509 (N.D. 1984) (citations omitted).

made within the taxable year."[172] Congress shows the importance of charitable donations by the broad definition it gives to deductible charitable donations: "[Subject to other limitations, a taxpayer may deduct from taxable income] any gift to or for the use of . . . [a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."[173]

Courts realize the limitation of government in meeting certain social needs. The Court in *Bob Jones University v. United States*[174] noted that "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose to supplement or take the place of public institutions of the same kind."[175] Tax breaks for charitable organizations "aid in the accomplishment of many social goals which our federal and local governments otherwise cannot or will not accomplish."[176]

The law of trusts also has a long history of favoring charitable application of resources.

> A charitable trust is often said to have certain advantages over the private trust. (1) Charitable trusts are not subject to the rule requiring definite beneficiaries. . . . (2) Charitable trusts may last in perpetuity, whereas a private trust in perpetuity would run afoul of the Rule Against Perpetuities. . . . (3) While private express trusts can accumulate income for only a definite period, income under charitable trusts may be accumulated for the period necessary to accomplish its purpose. . . . (4) [C]y pres[177] prevents termination of a charitable trust under circumstances which might terminate a private express trust. . . . (5) Under the older decisions trust funds for charity cannot be reached for torts committed by the trustee . . . .[178]

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[172]I.R.C. § 170 (a)(1) (West Supp. 1996).

[173]I.R.C. § 170 (c)(2)(B) (West Supp. 1996); *see also* I.R.C. § 642 (c) (West Supp. 1996): "Deduction for Amounts Paid or Permanently Set Aside for a Charitable Purpose." *But see*, Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825. Ms. Pace argues that the Internal Revenue Code contains corporate loopholes that encourage "flagrant indifference to the safety of others." *Id.* at 826.

[174]461 U.S. 574 (1983).

[175]*Id.* at 588.

[176]Bizinley v. Commissioner, 782 F.2d 1326, 1336 (5th Cir. 1986) (Hill, J., dissenting).

[177]*See infra*, notes 188-201 and accompanying text for a discussion of the role of cy pres in medical malpractice punitive damages.

[178]JOHN RITCHIE, ET AL, DECEDENTS' ESTATES AND TRUSTS 705-06 (8th ed. 1993).

English chancellors enforced charitable donations to indefinite beneficiaries even before the Statute of Uses[179] was enacted in 1601.[180]

The basis for this favored status of charitable trusts lies in the public benefit they provide.[181] The Restatement of Trusts lists six types of trusts that provide enough public good to warrant the above advantages.[182] The respective purposes are "(a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes the accomplishment of which is beneficial to the community."[183] Courts will go to great lengths to interpret language as falling within these broad classes of charitable trusts. For example, in *In re Jordan's Estate*,[184] the court held that a will leaving property simply "for charity" was sufficiently definite to establish a charitable trust, despite the lack of directions specifying a specific recipient of the property.[185] When a trust specifically identifies the promotion of health as its purpose, courts show an even greater propensity to give it effect. For example, in *In re Tomlinsons's Estate*,[186] the court noted the special public interest in protecting testatrix' donation of one-third of her estate to the American Cancer Society.[187]

Application of the cy pres doctrine[188] provides charitable trusts with the greatest potential for providing the general public the benefits of punitive damage awards. Courts apply the cy pres doctrine when a charitable trust becomes obsolete, when the beneficiary of a charitable trust ceases to exist, or when the purpose of the charitable trust has been fulfilled.[189]

The 1867 case of *Jackson v. Phillips*[190] shows the power of this doctrine. In *Jackson*, the testator left $10,000 to William Lloyd Garrison and others in trust "for them to use and expend at their discretion . . . such [ ] means, as, in their judgment, will create a public sentiment that will put an end to Negro slavery

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[179] 43 Ed.2 I, c. 4 (1601).

[180] *See* RITCHIE ET AL., *supra* note 178, at 704.

[181] RESTATEMENT OF THE LAW OF TRUSTS § 360 (1957).

[182] *Id.*

[183] *Id.* at § 368. "A fiduciary relationship with regard to property is a result of a manifestation of intent to create such a relationship subjecting the owner to equitable duties to manage property for a charitable purpose." *Id.*

[184] 197 A. 150 (Pa. 1938).

[185] *Id.*

[186] 245 Cal. App. 2d 793 (1966).

[187] *Id.* at 795.

[188] *See* WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 395 (4th ed. 1989).

[189] *Id.* at § 360.

[190] 96 Mass. (14 Allen) 539.

in this country."[191] The testator died in 1861, and after the Civil War the Thirteenth Amendment abolished slavery.[192] The testator's heirs claimed that since slavery had ended, the charitable trust's purpose had ended and the money should have been dispersed to the heirs. The court disagreed:

> Neither the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.... the Negroes, although emancipated, still stand in great need of assistance and education. Charities for the poor have been often held to be well applied to educate them and their children.[193]

The importance of this doctrine in the context of charitable donations of medical malpractice punitive damages is that future medical advances will not destroy the public benefit of the punitive damage. For example, the March of Dimes originally intended to fund research and treatment for polio. Once medical researchers found a cure for polio, the March of Dimes did not disappear. Rather, funds originally intended for polio research now continue to fund research for other childhood diseases.

The potential of this plan for improvement of health care is limited only by the creativity of the plaintiffs who designate the future use of the funds. This author cannot possibly formulate the best uses of punitive damages in any particular situation. Each case differs, and the victim of medical malpractice occupies the unique position of having firsthand knowledge of the suffering involved in an egregious wrong. These victims have the best claims to the privilege to designate the recipient. The author can only offer charitable donations as an alternative solution and illustrations of its possible application.

For example, in *Kavanaugh, M.D. v. Perkins*,[194] the plaintiff sought punitive damages from the doctor for her husband's death because she alleged that, while under the influence of drugs and alcohol, the doctor had performed surgery on her husband.[195] In such a case, the plaintiff might best serve the public by donating the punitive damages to Alcoholics Anonymous. The plaintiff might also donate the punitive damages to a medical hotline service that helps doctors with this type of problem. The plaintiff might believe the best solution to the problem lies in physician education. Thus, the plaintiff might donate the punitive damages to the medical licensing board's substance abuse program. All of these scenarios present a better solution than allowing the plaintiff to keep the entire award.

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191 *Id.* at 539.

192 *Id.*

193 *Id.* at 540.

194 838 S.W.2d 616 (Tex. Ct. App. 1992).

195 *Id.* at 619.

In *Seifert v. Burroughs*,[196] the parents of a ten-year-old girl sought compensatory and punitive damages from the doctor who misdiagnosed her appendicitis as gastritis and then failed to obtain informed consent for two surgeries prior to her death. A plaintiff in this situation has several viable recipients of recovered punitive damages. For example, the parents could donate the funds to a citizen watchdog group that tracks negligent doctors. Indeed, recent citizens' groups have begun internet web sites precisely for this purpose.[197] Administration of this web site requires money, and the plaintiffs might decide that this type of effort to inform patients deserves support.

In *Rossi v. Estate of Almorez*,[198] the HIV-positive plaintiff sought punitive damages from the estate of the doctor who operated on her without informed consent. She claimed that the late doctor knew that he had AIDS and that he gave her the disease.[199] Countless possible recipients of punitive damages in an AIDS case exist. Most obviously, the plaintiff could donate the funds to AIDS research. The plaintiff might simply place the funds in trust for future AIDS victims who lack medical insurance. The plaintiff might also like to help future victims of malpractice who cannot collect from an insolvent health care provider. The possibilities do not end.

Finally, in *Stone v. Foster, M.D.*,[200] the plaintiff sued her doctor for punitive damages as a result of a grossly negligent "tummy tuck."[201] A plaintiff in this situation might donate the punitive damages to a non-profit weight-loss center or to a school system's health department that teaches children the virtues of exercise and a balanced diet.

The author simply points out that, just as limitless as the situations that can give rise to punitive damages, so, too, are the possible future benefits to health care. Charitable donations provide an answer to the punitive damage problem in medical malpractice actions.

V. CONCLUSION

In *Oberg*,[202] the plaintiff's attorney asked the jury in closing arguments to hold the defendant responsible for outrageous wrongs inflicted upon 1000 people: "That's wrong, ladies and gentlemen. They ought not be permitted to

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196 526 N.E.2d 813 (Ohio 1988).

197 *Massachusetts Miracle*, PEOPLE'S MED. SOC'Y NEWSL., Oct. 1996, at p.4. Under pressure from citizen information advocates, Massachusetts became the first state to post malpractice settlements and hospital and medical board disciplinary actions on the internet. *Id.*

198 No. 90344028, 1991 WL 166924 (Md. Cir. Ct. May 23, 1991).

199 *Id.*

200 106 Cal. App. 3d 334 (1980).

201 *Id.*

202 116 S. Ct. 1589.

keep that. You should do something about it."[203] This author agrees—especially when the defendant commits outrageous wrongs involving an individual's personal health. However, that "something" to which the attorney referred should not include the traditional approaches to punitive damages: The law should not allow the complete medical malpractice punitive damage award to go directly to the plaintiff; the law should not arbitrarily limit health care providers' liability at a fixed maximum; and the law should not provide the state with the opportunity to abuse its "prosecutorial powers" that inevitably occurs when it has an interest in punitive damages.

Instead, cases involving outrageous medical malpractice should incorporate a solution that avoids the problems of the current approaches, holds a favored position in the law, prevents the existence of many future victims, and efficiently converts the misfortunes of current malpractice victims into benefits for the greatest number of victims in the future. In other words, the law should utilize the benefits of charitable donations of punitive donations in medical malpractice cases.

NICHOLAS M. MILLER[204]

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[203] 1995 WL 126508 (U.S. Ala. Pet. Brief) at 31.

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